No. 15,016

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SALOMON R. SANDEZ, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of three counts of an indictment involving other co-defendants; Count Eight [T. 5],[1] the importation of approximately 40 ounces of morphine into the United States from Mexico; Count Nine, the facilitation and transportation of the same quantity of morphine, both of which counts are charged to be offenses in violation of Title 21, United States Code, Section 174, and Count Ten [T. 6], conspiring with others in violation of Title 18, Section 371 of the United States Code, to commit offenses against the United States in conspiring to bring narcotic drugs into the United States in violation of Title 21, Section 174 of the United States Code.

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[1]The abbreviation "T" hereafter refers to "Transcript of Record," the clerk's.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

The jurisdiction of the district court was based upon Section 3231 of Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

Appellee adopts the statement of facts as set forth in appellants' opening brief with the following additions: Inasmuch as this appeal is had by only one of the defendants it is deemed appropriate to focus attention to the facts of the case that pertained to the appellant Sandez. It is to be observed that the initial negotiations leading up to the arrest, which arrest occurred on April 15, 1955, were had between a federal narcotic agent, the witness Lawrence Katz, Katz using the name of Benny Lean, who first talked to the defendant Perno over the telephone on March 12, 1955. [R. 18.][2] Following this conversation arrangements were made whereabouts dealing in narcotics between Perno and Katz followed. These were the subject matter of evidence that was introduced supporting the conviction of Perno on Counts 1, 2, 3, 4, 5 and 10.

In the course of the negotiations between Agent Katz and Perno, we find that on the morning of April 15, 1955, Perno came to the Hotel Constance in Pasadena where the Agent Lawrence Katz was registered and told

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[2]Reporter's Transcript shall throughout be abbreviated by "R."

Agent Katz that everything was alright and elaborated that his, Perno's connection, was one called "Tutu" who had brought two kilos of heroin from Mexico the previous day and stated that this person had come from Tijuana. Perno further advised Agent Katz at this meeting that "Tutu" was a nephew of the Governor of Lower California and that everything was alright and explained how the arrangements for the delivery of the drugs would be had and the payment therefor. [R. 60-61.] Perno told Agent Katz to place $25,000 in a foot locker of a Greyhound Bus Terminal, Agent Katz to retain the key until he was satisfied with the narcotics to be sold for this price. [R. 68.] Perno also told Katz to go to Rays Motel located in the 6300 block on South Figueroa in Los Angeles and to thereafter call Perno at a telephone number given to Agent Katz, namely, Pleasant 8-1879. This telephone number was written down on a card retained by Agent Katz. [R. 62-63; Ex. 6.]

This phone number, Pleasant 8-1879, is significant to this case as it was the telephone number of the co-defendant Golden Elliott whom, for want of a better characterization, we will term the "girl friend" of defendant Perno. This phone number was found written on a reverse side of a card taken from the possession of the defendant Flores subsequent to his arrest. [Ex. 25; R. 355 and 358.] At the time of the search of the appellant Sandez, subsequent to his arrest, a like business card of the same doctor was found in the possession of the appellant Sandez. [Ex. 30; R. 466-469.] Written in pencil on the reverse side of this doctor's business card was the following: "Vince. Pleasant 9-7818." [It will be observed that the numbers of this phone number

written upon the reverse side of Ex. 30 that was taken from the possession of the appellant Sandez was the same phone number as that of Golden Elliott excepting the numerals were written in reverse fashion.] It is also to be observed that a business card bearing the name of this same doctor, namely, "Dr. Eloy Avando H., Medico," upon the back of which was written "Freddie Sandez, Avenita F15, Apartment C. Tijuana, B. C." was taken from the person of Perno following his arrest. [Ex. 27; R. 397-398.]

Agent Katz further testified that he had occasion to investigate the location of the phone number Pleasant 8-1879, that it was 6603 South Avalon Boulevard and that such phone was listed to the name of defendant Golden Elliott. [R. 64.] It is to be observed that Officer Landry, a Deputy Sheriff of Los Angeles County attached to the Narcotics Detail, together with fellow officers, saw defendants Greer and Brown enter Elliott's apartment at 6603 South Avalon Boulevard at about 2:30 p.m. on April 15, 1955, but did not see Brown or Greer come out of such apartment but next saw them in the vicinity of the Main Motel at about 8:00 p.m. on the evening of April 15, 1955, when Brown and Greer were placed under arrest. [R. 436-438.]

Agent Katz further testified that he, Perno, and another officer drove to a Greyhound Bus Terminal and placed money in a locker located in such terminal retaining possession of the key, at about which time Perno told Katz that the reason for the delay was that his connection, "Tutu," had to leave the previous night for Tijuana because "Tutu's" wife was having a baby, and "Tutu" was expected back to Los Angeles momentarily and that it should not take much longer. [R. 68.] Katz testi-

fied that on that same evening at about 6:30 p.m. he called Perno at the Pleasant number and talked to Perno, that later on that same evening he called the same Pleasant number and talked to a person who identified herself as "Goldie" and asked where Vince was, Vince being the first name of the defendant Perno, and was told by Goldie that Perno was on his way over to see him (Katz) and that shortly thereafter Perno arrived at the Ray Hotel where Jones and Katz were waiting. [R. 69.]

The following events are certainly not in dispute and they are those whereby Agents Katz and Jones were directed by Perno to go to the New Main Motel located at 71st and Main Streets. This is the location where the larger quantity of heroin was seized from a cabin after defendants Greer and Brown had left such cabin and after defendant Perno was shot as he apparently attempted to shoot one of the Federal Narcotics Agents.

The narcotics recovered at this occasion are the same narcotics as are the subject of Counts 8, 9 and 10. Prior to the arrest of appellant Sandez, it is to be noted Deputy Sheriff Ruskin together with other officers, and particularly Deputy Buchanan, had followed Perno and Katz from the motel on Figueroa Street to the New Main Motel on 71st and Main Streets. [R. 349.] Officer Ruskin testified that he had observed Sandez standing on the corner and a 1953 Chevrolet convertible parked behind his vehicle with another person sitting in it, who later proved to be the defendant Flores, and that he observed the license plates of the automobile not to be of California origin and later observed the plates to be from Baja, California. Subsequent to the arrest of Sandez an insurance identification card [Ex. 26] covering a 1953 Chevrolet made out in the name of Salomon R. Sandez

was recovered from the wallet of the defendant Sandez. [Ex. 26; R. 359-363.]

Officer Ruskin described the conduct of appellant Sandez as follows:

> "A. I saw Sandez on the corner. I saw him look around. He looked across to the motel. He was approximately the width of the street directly across from Room No. 1.
>
> He walked there, looked around, sort of wrung his hands around, looked around again, and walked back to his vehicle, and got into the car. He then got out again, walked back to the corner again, looked around, and he sort of stared at our car for quite a while, looked at the motel, looked up and down the street, and looked toward the defendant Perno's car.
>
> He walked back to his vehicle again, and got into it." [R. 350-351.]

Officer Ruskin further testified that on that same evening he had seen the defendants Greer and Brown walk out of Apartment 1 of the New Main Motel shortly after 8:00 o'clock; he was present when a shot rang out whereupon he took defendants Sandez and Flores into custody. [R. 351-352.]

Ruskin testified to a conversation that he had with Sandez which is as follows:

> "A. At the time of taking Sandez and Flores in custody, suspect Sandez stated, 'I am not doing anything. What do you want? I am just waiting for somebody,' in approximately those words, not in my exact words. He said, 'I am waiting for a guy. We are not doing anything.'

> And Flores stated also they weren't doing anything. And upon bringing the car over to the parking lot, I started to search the car, and while searching the car, I had the lights on, and Mr. Sandez asked me to please turn off the lights, as there was a weak battery."
>
> Q. Did he say that in English to you? A. He said it in English." [R. 354.]

Officer Ruskin testified he did not speak Spanish "at all." [R. 352.]

Officer Ruskin testified to an additional conversation that he had had later in the night of April 15 in the Narcotics Office in the Federal Building at Los Angeles stating that he spoke English to both Sandez and Flores, whereupon Sandez gave his age, presented a business card stating that he, Sandez, had a cafe in Tijuana, a bar and several taxicabs. It appears that Sandez had some difficulty in speaking English whereupon Flores helped translate while the booking slip was being filled out. [R. 364-365.] Upon cross-examination, Officer Ruskin explained the manner of conducting his conversations with the defendant Sandez. [R. 372.] He also stated that Sandez had asked him to turn off the lights of the car because of a weak battery. [R. 375.]

Deputy Sheriff Buchanan of the Narcotics Detail, who accompanied Officer Ruskin on the surveillance both of the motel on Figueroa Street and later at the motel at 71st and Main Street, is the one who actually arrested appellant Sandez. He stated that he saw Sandez and Flores in the Chevrolet convertible parked directly behind their car. Concerning the movements of Sandez he testified as follows:

"A. Well, defendant Sandez, I observed him walk on the north side of—that would be the north side of 71st street, towards the corner of Main Street. Then he walked back and out of my view to his automobile, which was behind me.

Then a short time later he walked again to the corner, and then north on Main Street out of my view, and back around, and back into his car, and then a short time after that there was a shot—that Agent Katz came outside and fired a shot in the air, and I went back in company with—

Q. Did you then put defendant Sandez under arrest? A. Yes, sir, I did." [R. 466.]

Deputy Buchanan also testified that he conducted a search of the defendant Sandez and thereupon found Exhibit 30, the doctor's card which upon the opposite side had the phone number listed to the defendant Golden Elliott written in reverse fashion. [R. 466-467.] It is to be observed that the arrest of Sandez was made after Officer Buchanan had observed Agent Katz come outside of one of the cabins of the motel and fire a shot in the air. Buchanan stated that his suspicion was aroused when Sandez went up to the corner and looked over to the car the officers were in. [R. 471.] Officer Buchanan likewise related what Sandez had stated after he had handcuffed Flores and Sandez together, relating that he had spoken to Sandez in English. [R. 472.]

The defendant Golden Elliott took the stand, related that she lived at 6603 South Avalon, admitted an acquaintance with the defendant Vince Perno [R. 567-568], stated that she had permitted Perno to leave personal belongings in her apartment. [R. 569.] Upon cross-examination it was elicited that on April 15, 1955, Mrs. Elliott's phone number was Pleasant 8-1879.

After the jury had deliberated for some period of time a verdict was arrived at for all defendants except Elliott. [R. 778.] The Government stated that it did not feel the evidence was sufficient to hold defendant Golden Elliott and the court granted a motion acquitting the defendant Elliott. [R. 773 and 786.]

Federal Narcotics Agent Jones testified concerning conversations he had in the evening of the arrest in the Federal Building when he interrogated both defendants Sandez and Flores at which point an objection was made on behalf of Sandez that such conversations were immaterial because no *corpus delicti* was established. [R. 178.] The court overruled such objection and explained the law as understood by the trial court with respect to receiving any such possible admissions. [R. 179.] Agent Jones stated that he identified himself to Sandez as a Federal Agent, advised Sandez that he need not give a statement, that he was speaking to him in English. He testified as follows [R. 181-182]:

> "A. I asked defendant Sandez if that was his correct name. He said, 'Yes.'
>
> Q. He said what? A. He said, 'Yes.' I then asked the defendant Sandez if he was also known as Tutu.
>
> Q. What did he say to that? A. 'That's right.'
>
> * * * * * * * *
>
> A. I asked the defendant Sandez if he and the defendant Flores had come to the Los Angeles area from Mexico in the 1953 yellow Chevrolet convertible carrying the narcotics.
>
> Q. And did he answer that question? A. He said, 'Yes.'
>
> Q. Do you recall anything further said about that during the course of your interrogation of the

defendant Sandez? A. Yes. He stated that he was the owner of the El Gato Negro Bar in Tijuana. He produced a card, a business card of some kind, to verify this. He stated also that he had some taxi cabs in Tijuana.

That was just about the limit of the conversation at that time.

Q. That was the substance of your conversation? A. Yes."

Statutes Involved.

So far as pertinent to this appeal Counts 8 and 9 were brought under Title 21, United States Code, Section 174; Count 10 being brought under the conspiracy statute, Title 18, United States Code, Section 371, a conspiracy in violation of the provisions of Title 21, Section 174. So far as pertinent to this appeal, Title 21, United States Code, Section 174 provides as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be . . ."

* * * * * * * *

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT.

I.

The Defendant Sandez Was Not Denied Due Process of Law. He Was Properly Arraigned.

Commencing on page 17 of appellant's opening brief, argument is advanced that this defendant was not accorded due process of law, the contention being urged that he was not arraigned. We agree that all defendants are entitled to an arraignment. We further agree that even though there was no treaty with the Mexican Government covering this particular subject, this defendant, indeed even enemy aliens, is entitled to due process of law.

Subsequent to the filing of appellant's opening brief, a stipulation had been entered into whereby there is now before this court a supplemental clerk's transcript of record which contains copies of the "Minutes of the Court" had on May 23, 1955, first before the Honorable Peirson M. Hall who on such date transferred the case to Judge Leon R. Yankwich, secondly the "Minutes of the Court" on May 23, 1955, before Judge Yankwich from which minutes it clearly appears that the defendant Sandez while then and there represented by his counsel, Paul Angeliello, was arraigned. So there could be no doubt on the matter it was likewise stipulated that the reporter's transcript of the proceedings had on May 23, 1955, be made a part of the record on appeal and there has been supplied to this court an original reporter's transcript of the arraignment held before Judge Yankwich on Monday, May 23, 1955. We have seen fit to have such reporter's transcript accompany our brief as an appendix thereto. On page 3 and thereafter of such reporter's transcript of the proceedings of May 23, 1955,

before Judge Yankwich, it clearly appears that Sandez was arraigned, that the reading of the indictment was waived, Sandez through an interpreter pled not guilty to each of the three counts in which he was charged in the instant indictment.

Even though Sandez had not been arraigned the law seems to be settled that the right to be arraigned and to make a plea are waived by going to trial.

Beaty v. United States, 203 F. 2d 652, 654 (C. A. 4, 1953).

The record clearly shows that when the case was called for trial no assertion was made by Sandez's counsel that he had not been arraigned. In fact the only defendant that was not arraigned was the defendant Eddie Sonnelli and he was not arraigned because he had never been apprehended.

An arraignment is not necessary to constitute due process of law where the accused has had sufficient notice of the accusation and an opportunity to defend himself.

Garland v. Washington, 232 U. S. 642-645 (1914).

It has been stated that a record citing an accused's arraignment in open court before trial and his plea of not guilty to the indictment imports verity and cannot be contradicted by the accused unsupported assertion that he did not know of the accusation until the date of trial.

Yodock v. United States, 97 Fed. Supp. 307, 310 (D. C. Pa., 1951).

To like effect:

Caldwell v. United States, 160 F. 2d 371 (C. A. 8, 1947).

II.

The Corpus Delicti Had Been Established as to All Counts to Which Sandez Was Convicted and His Admissions Made After His Arrest Were Properly Received.

This court as recently as April 10, 1956, in *Ryno v. United States,* 232 F. 2d 581, re-announced the rule that evidence corroborating appellant's confession need not independently prove the commission of the crime charged either beyond a reasonable doubt or by a preponderance of evidence, and indicated that the same rule applied to admissions.

It is frequently forgotten that the *corpus delicti* does not properly include as a third element the agency of the accused as the criminal. In other words, the phrase *corpus delicti* does not include the fact of connection of the accused to the crime nor his identity as the criminal, nor that he is the guilty agent through whom wrong has occurred.

> *United States v. Echeles,* 222 F. 2d 144, 155-156 (7th Cir., 1955).

The rule of corroboration does not require proof beyond a reasonable doubt. Neither does it require direct evidence, circumstantial evidence may be sufficient for such purpose. *Ercola v. United States,* 131 F. 2d 354, 358 (C. A. D. C.) at page 358:

> "The rule of corroboration, it will be remembered, does not require proof beyond a reasonable doubt. Neither does it require direct evidence. Circumstantial evidence may be sufficient for that purpose. . . ."

As was said in *United States v. Kertess,* 139 F. 2d 923 (C. A. 2), cert. den. 321 U. S. 795 on page 929:

> "Any corroborating circumstances will serve which in the Judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of proof."

As to proof of the identity of the perpetrator of the act or crime as not being a part of the *corpus delicti* see *United States v. Di Orio,* 150 F. 2d 938 (C. A. 3, 1945), cert. den. 326 U. S. 771. To like effect see:

> *George v. United States,* 125 F. 2d 559, 563 (C. A. D. C., 1942).

In a relatively recent narcotic case the above principles are reaffirmed. The extra confessional proof required need not of itself preponderantly establish the guilt of the defendant and if it shows by independent facts that crime has been committed against which the jury can measure the reliability and the consistency of defendant's own statements, such is sufficient corroboration. See:

> *United States v. Markman,* 193 F. 2d 574, 576 (C. A. 2, 1952).

The Supreme Court has recently clearly stated the rule with respect to corroborative evidence independent of the statements to establish the *corpus delicti.* In *Opper v. United States,* 348 U. S. 84, 93 (1954), the court stated the rule:

> "However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.* It is necessary, therefore, to require the Government to introduce substantial independent evi-

dence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith v. United States, post,* p. 147. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt." (P. 93.)

The Supreme Court likewise stated the rule in *Smith v. United States,* 348 U. S. 147, 156:

> "There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty."

Tested by the above principles it is seen in the instant case that before Sandez made any admissions either immediately after his arrest or when later questioned at the Federal Building on the night of his arrest, that a crime or crimes (those later charged in Counts 8, 9 and 10) had been committed. The evidence clearly shows that the quantity of heroin found in the cabin at the motel at 71st and Main Streets which was the same heroin as that involved in Counts 8 and 9 had been found under circumstances indicating the commission of a crime by

someone. This being so the admissions made by Sandez were shown to be trustworthy by reason of the independent evidence establishing the criminal means or *corpus delicti* and were properly received to be considered by the jury. The court gave instructions pertinent to this phase of the case, instructing the jury that any statement or admission made after the arrest must be considered as having been made after the criminal conspiracy had ended and could be considered only in connection with the guilt or innocence of that person. [R. 742.]

The rule has been stated in the *Braswell* case, subsequent to the *Opper* and *Smith* opinion, *supra,* and in light of such opinions, that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti.* It is only necessary that the government introduce substantial independent evidence tending to establish the trustworthiness of the admission. It is enough that the independent evidence supports the essential facts admitted suffiicently to justify a jury's inference of their truth. When this test has been met the evidence as a whole must be sufficient to find guilt beyond a reasonable doubt.

Braswell v. United States, 224 F. 2d 706, 711 (C. A. 10, 1955).

(a) Substantial Evidence.

This court has held that a conviction may be sustained where the substantial evidence is conflicting upon the premise that the conflict is to be resolved in favor of the appellee, *i.e.,* if there is substantial evidence to support the verdict.

Todorow v. United States, 173 F. 2d 439 (C. A. 9, 1949), cert. den. 337 U. S. 925.

Substantial evidence has been defined as being such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

> *Battjes v. United States,* 172 F. 2d 1 (C. A. 6, 1949).

To like effect in defining what is meant by substantial evidence this circuit is in accord with the aforementioned case. *Woodward Laboratories, Inc., et al. v. United States,* 198 F. 2d 995 (C. A. 9, 1952), p. 998:

> "Substantial evidence is * * * such relevant evidence as a reasonble mind might accept as adequate to support a conclusion * * *."

III.

The Search of the Appellant Sandez Was Incident to a Lawful Arrest and Was a Reasonable Search.

It is to be observed from both the testimony of Officer Ruskin and also Officer Buchanan that Sandez was not arrested until after the hearing of a shot fired by Agent Katz who had just emerged from a cabin of the motel where the transfer of this relatively large quantity of heroin had taken place between Perno and Katz. [R. 466.] Following the arrest of Sandez a cursory search was conducted and upon his person was found Government Exhibit 30. This is the doctor's card upon which backside was the writing: "Vince Pleasant 9-7818" which is the phone number of the defendant Golden Elliott, the numerals being written in reverse fashion.

The record is clear that on April 15, Agent Katz had contacted Perno by calling him on Golden Elliott's phone number Pleasant 8-1879. Vince Perno had given this phone number to Katz. [R. 62-63.] It is but logical to assume that a carrier of narcotics, be he a co-conspirator

or a confederate of Perno, could be expected to have such phone number, and an additional consciousness of guilt is to be noted when the numerals of this phone number were placed on this card [Ex. 30] in the reverse fashion of the true phone number at the apartment of the defendant Golden Elliott.

Counsel representing Sandez was content to make no objection upon the ground of an alleged illegal search and seizure following the arrest of appellant Sandez. His only objection was the manner which counsel representing the Government were interpreting Exhibit 30 when it was presented in evidence. [R. 467-469.]

Rule 41(e) of the Federal Rules of Criminal Procedure sets forth the procedure to be followed by a person contending a grievance by an unlawful search and seizure. No motion to suppress was filed prior to trial. Sandez's counsel elected to waive a motion to suppress such card when he became aware of its existence when produced at the trial. This we feel constitutes a waiver of a matter which should not be raised for the first time on appeal. This court has quite recently discussed the principles of law attendant to the right of arrest and search without a warrant when a felony has been committed. See *Kremen v. United States,* 231 F. 2d 155, 167 (C. A. 9, 1956) and there discussed the outstanding Supreme Court cases pertaining to the right of a search of a person incident to an arrest. Quoting from cases that clearly announce that it is only *unreasonable* searches and seizures that are prohibited by the Fourth Amendment. This court there stated on page 168:

> "It is hornbook law that officers have the right to arrest without a warrant when a felony is being committed in their presence."

The lawfulness of an arrest has been decided by the Supreme Court to depend upon the law of the state of the arrest. *United States v. Di Re,* 332 U. S. 581 (1948); *Johnson v. United States,* 333 U. S. 10 (1948). In this state California Penal Code, Section 836, sets forth the grounds for arrest pertaining to arrest by peace officers. This section of the Penal Code is set forth on page 27 hereof. It is submitted that Officer Buchanan under the facts which must have been related to him from previous contacts with his fellow officers and which were observable, had probable cause for making the arrest of Sandez under one or more of the grounds set forth in the Penal Code, Section 836. He had reason to believe that a felony had been committed.

No effort was made in the cross-examination of Officer Buchanan to elicit facts that may have been known to him as is illustrated by the case of *People v. Bowles,* the case cited on page 27 of appellant's opening brief, 45 Cal. 2d 652 (1955). The *Bowles* case is not contrary to the government's position in the instant case, as it points out that the defendant was not in a position to challenge the failure of the record to establish the basis for the officers' belief, because of objections the defendant had interposed when the prosecuting attorney had sought to establish the basis of the officers' probable or reasonable cause. The California Supreme Court continues to state at page 656;

> "It is settled, however, that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. (*Brinegar v. United States,* 338 U. S. 160, 171-176.) . . ."

The case of *People v. Brown,* 45 Cal. 2d 640 is not parallel to the facts in the instant case. This case is referred to by appellant on page 27 of their opening brief. The appellant in the *Brown* case was not placed under arrest. The facts in the case indicate that the officers there arbitrarily seized Irma Brown without having any reasonable cause to believe that she was committing a public offense.

An additional California case urged by the appellant is that of *People v. Cahan,* 44 Cal. 2d 434. We have no quarrel with the ruling of that case in the departure of the Supreme Court of California of its former views concerning this subject. We believe it is in full accord with the Federal rule, but we are at a loss to understand its application to the facts of the instant case. In the *Cahan* case dictaphones were unlawfully placed in the quarters of persons engaged in the horse racing booking enterprise. Flagrant violations of constitutional guarantees against unreasonable search and seizure occurred. The evidence thus obtained was unconstitutionally obtained. The facts of the *Cahan* case are dissimilar with the obtaining of Exhibit 30 which were derived from appellant Sandez subsequent to his valid arrest.

In passing, we call attention that the Supreme Court of the United States has held that where the entry was lawful, no unreasonable search and seizure occurs where the officer has a concealed microphone.

On Lee v. United States, 343 U. S. 747 (1952).

It is, of course, true that in certain instances the appellate courts have acknowledged the illegality of an unlawful arrest even though not raised at the trial court. However, the weight of authority is that such alleged error may

not be assigned for the first time on appeal. The following cases support this:

United States v. Jones, 204 F. 2d 745 (7 Cir., 1953). The last mentioned case pertains to a narcotic charge where at trial no contention had been made that the arrest was illegal. The appellate court did not feel such alleged error should be raised for the first time on appeal. To like effect see *Stein v. United States,* 166 F. 2d 851, 855 (C. A. 9, 1948). In the case of *Wyche v. United States,* 193 F. 2d 703 (C. A. D. C., 1951) no motion to suppress had been made in the trial court. The appellate court held that it would not substitute its judgment of proper trial tactics for that of the lawyer of the forum.

It has been held that where a defendant did not move before trial to suppress evidence allegedly illegally seized or explain his failure to do so no complaint could be made on appeal of the admission of such evidence.

> *Comer v. United States,* 142 F. 2d 697, 699 (C. A. D. C., 1944).

In an exhaustive opinion pertaining to the seizure of altered postage stamps the Supreme Court held where the search was made incident to arrest, the opportunity in time to get a search warrant was immaterial. *United States v. Rabinowitz,* 339 U. S. 56 (1950). The opinion points out there can be no rule of thumb requiring that a search warrant must always be procured, that the judgment of the officers as to when to close a trap on a criminal committing a crime in their presence and who they have reasonable cause to believe is committing a felony, is not determined solely upon whether there was time to procure a search warrant. Flexibility should be accorded such law officers and the test is not whether

it is reasonable to procure a search warrant, but whether the search was reasonable upon all the facts and circumstances and the total atmosphere of the case. Even in the case of *McDonald v. United States,* 335 U. S. 451 (1948), pertaining to the conducting of a lottery, while the court held the search to be unreasonable still the court held so because there was no emergency which justified the non-procurement of a search warrant.

In the case of *Brinegar v. United States,* 338 U. S. 160 (1949), the court on page 175 commented as follows:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> " 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' *McCarthy v. De Armit,* 99 Pa. St. 63, 69, quoted with approval in the *Carroll opinion.* 267 U. S. at 161. And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke v. United States,* 7 Cranch 339, 348. Since Marshall's times, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States* 267 U. S. 132, 162."

It must be observed in the instant case that Officer Buchanan when he arrested Sandez was operating in an emergency. No opportunity presented itself to secure a search warrant. Furthermore, the logical inference is that Officer Buchanan must have been apprised of facts from contacts with his fellow officers that Perno was working with confederates or co-conspirators. When he heard the shot ring out he was justified in acting as he did. Probable cause existed and the later search conducted of Sandez following his arrest was not unreasonable.

The case of *United States v. Di Re,* 332 U. S. 581, recognizes the distinction between an arrest without a warrant for a misdemeanor not occurring in the presence of the arresting officer as compared to a felony. This distinction between a misdemeanor and a felony upon which later type of offense the officer had reasonable grounds to believe the suspect had committed is recognized by the court (p. 591). In the instant case, the crime Sandez was suspected to be a participant in was unquestionably a felony, hence the officer was not required to have witnessed its commission if he had reasonable grounds to believe the suspect had committed a felony or that a felony had in fact been committed.

A case somewhat similar in the contents of a paper taken from an accused when arrested and which clearly supports the reasonableness of the arrest of such suspect is United States v. Heitner, 149 F. 2d 105 (C. A. 2, 1945), the court stated with respect to the seized paper (p. 106):

> "Heitner's other complaint is of the admission against him of a paper found in his pocket at his arrest which bore the telephone number of a prune

> pitter. The still was being used to make a liquor out of prune juice; and there was ground to infer from Heitner's carrying such a telephone address that he wished to make use of the prune pitter to pit the prunes whose juice he distilled. As to its competency, it has long been established that the person of one lawfully arrested may be searched, and that anything found may be used against him. *Agnello v. United States,* 269 U. S. 20, 30."

It is not our desire to overburden the court with a long list of authorities; however, we feel the following discussion may be of some assistance in connection with the problem now before the court.

The legality of arrests, searches, and seizures without warrants has received judicial recognition, and the general problems of their legality are certainly not matters of first impression in this Circuit. *Symons v. United States,* 178 F. 2d 615, 619 (C. A. 9, 1950); *Leong Ching Wing v. United States,* 95 F. 2d 903 (C. C. A. 9, 1938); *Papani v. United States* 84 F. 2d 160 (C. C. A. 9, 1936), reversed because the search was not made at the place of arrest; *Donahue v. United States,* 56 F. 2d 94 C. C. A. 9, 1932), to cite but a few cases in which this court has considered such issues.

In *Go-Bart Importing Co. v. United States,* 282 U. S. 344, 357, dealing with the question of whether the officer had "reasonable grounds to believe that the person so arrested is guilty of such felony," the court stated: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." And this court has adopted this

view, quoting the above works in the *Rocchia* case, *supra* (78 F. 2d at 969).

Succinctly restating the applicable principles, 4 *American Jurisprudence* (1939), Arrest, Par. 25, p. 18, says:

> "An officer with authority to conserve the peace has, in making arrests, all the common-law authority of a constable or watchman and may, without a warrant, arrest any person who has committed a felony in or out of his presence or who has attempted to commit a felony in his presence. He may arrest any person who he, upon reasonable grounds, believes has committed a felony, even though it afterwards appears that no felony was actually perpetrated."

And, as stated further in that work, Par. 48, pp. 33-34:

> "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. Yet probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth for the officer to see and know that the law is being violated. Nor is it necessary for him to satisfy himself beyond question that a felony has in fact been committed, to justify an arrest without a warrant, though he may not act on unsubstantial appearances or unreasonable stories."

Again, referring to the *Papani* case, *supra* (p. 163), this Circuit has held that:

> "The probable cause, which must exist to enable an officer to arrest for the commission of past felo-

nies, is defined in *Stacey v. Emery,* 97 U. S. 642, 645, 24 L. Ed. 1035, as follows:

> " 'If the fact and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.' "

See also, *Carroll v. United States,* 267 U. S. 132, 161, quoting this language with approval; *Kwong How v. United States,* 71 F. 2d 71 (C. C. A. 9).

As also stated in the *Carroll* case, *supra* (p. 161), quoting from *Commonwealth v. Carey,* 12 Cush. 246, 251:

> "* * * if a constable or other peace officer arrest a person without a warrant he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one of his own knowledge of facts, or on facts communicated by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful * * *.
>
> "The substance of all definitions is a reasonable ground for belief in guilt."

A district court opinion wherein the subject matter of search and seizure and arrest without a warrant has been carefully considered, and where many of the authorities have been reviewed, is that of *United States v. Bell,* 48 Fed. Supp. 986 (D. C. Cal.). We quote from page 992:

> "Courts thus make reasonableness not a matter of abstract theory, but a pragmatic question, to be determined, in each case, in the light of its own circumstances."

In this connection and as is indicated in the *Di Re* case, 332 U. S. 581, "* * * the arrest by judicial process for a federal offense must be 'agreeably to the usual mode of process against offenders in such states,'" in the absence of an applicable federal statute. We cite for the court's observation the California statute pertaining to arrests by peace officers, namely, Section 836 of the California Penal Code:

> "§836. *Arrests by peace officers: (Arrest under warrant or without warrant in certain cases authorized).*
>
> A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:
>
> 1. For a public offense committed or attempted in his presence.
>
> 2. When a person arrested has committed a felony, although not in his presence.
>
> 3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
>
> 4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.
>
> 5. At night, when there is reasonable cause to believe that he has committed a felony. (Enacted 1872.)"

IV.

The Possession of the Appellant Sandez of the Narcotics Involved as Charged in Counts 8, 9 and 10 Need Not Be Personal Possession, Such Possession May Have Been Constructive Possession.

On page 30 of appellant's opening brief and again on pages 34 and 35, the contention is urged that no showing was made that the defendant had possession of the narcotics found, the subject matters of Counts 8 and 9 and also the conspiracy Count 10. The contention is advanced that the last paragraph of Title 21, Section 174, dealing with presumptions requires the showing of personal possession.

This argument overlooks numerous cases decided by this court stating that such possession need not be personal but may be constructive. Before citing such cases we direct attention to the trial court's instructions which properly recognized that possession may be sole or joint or actual or constructive possession. [R. 736.]

This court has recently reannounced this principle in a narcotic case, interpreting the last paragraph of Section 174 of Title 21, stating (p. 297), "Possession is not required for the offenses of which appellant was charged and convicted." And further held that it is not necessary that possession be immediate or exclusive.

Brown v. United States, 222 F. 2d 293, 296 (C. A. 9, 1955).

This court, in the case of *Pon Wing Quong v. United States,* 111 F. 2d 751, p. 754 (C. A. 9, 1940), recognized

that one may be guilty who aids and abets by recognized principles of law of constructive possession (pp. 756-757):

> "Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment."

And, again in the same case on page 758:

> "Possession of the opium as that expression is commonly understood is in neither case a requisite of guilt."

See also:

> *Borgfeldt v. United States,* 67 F. 2d 967 (C. C. A., 1933).

In the *Borgfeldt* case the court specifically stated that an instruction to the effect that the possession contemplated by the statute must be "personal and exclusive" was *not* correct, and that the Government need not show that the morphine was actually concealed by the defendant (see p. 969).

Another *narcotic* case to the same effect:

> *United States v. Cohen,* 124 F. 2d 164 (C. C. A. 2), cert. den. 315 U. S. 811 (*Bernstein v. United States*).

In the *Cohen* case, four defendants were convicted of concealing and facilitating concealment of morphine. The Court stated, on page 165, as follows:

> "The defendants were all convicted upon both counts and each has appealed. Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have

had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. *United States v. Hodorowicz,* 7 Cir., 105 F. 2d 218, 220, certiorari denied 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; *Vilson v. United States,* 9 Cir., 61 F. 2d 901."

An additional *narcotic* case is:

Mullaney v. United States, 82 F. 2d 638 (C. C. A. 9, 1936).

In the *Mullaney* case on pages 642 and 643, in discussing instructions which are rather similar to the ones given in the instant case, the court pointed out, particularly on page 642, that an instruction requiring that possession must be "personal and exclusive," was not correct.

It should be observed in this case that appellant Sandez interposed not one single objection to the instructions given. [R. 754.]

In view of no objections it should be assumed that the court fully instructed the jury on all the pertinent issues and principles involved. The jury was instructed on the law pertaining to conspiracy. [R. 739, *et seq.*] The pertinent portions of the statute involved, namely, 21 U. S. C. 174 were read to the jury. [R. 731.] The customary general instructions were given as is the custom of this trial judge long experienced in presiding over jury trials. The court advised the jury of the principles of law embodied in Title 18 United States Code, Section 2, namely, the law pertaining to aiding and abetting, another in the commission of a crime. [R. 734-735.]

In light of this record and in light of the fact that from all the facts and circumstances, the admissions made

by the defendant Sandez, declarations made by the co-conspirator Perno during the furtherance of the conspiracy concerning the source of narcotics as being from "Tutu" from Tijuana [R. 60-61], the fact of Sandez's highly inferentially guilty presence at the site of the crime directly contemporaneous with the delivery and acceptance of this large quantity of heroin which was being sold for $25,000, clearly presents a position justifying the application of the so-called presumptive phase of the last paragraph of Title 21, United States Code, Section 174, dealing with the unexplained possession of such narcotics; despite the fact that the narcotics when found were not on the immediate person of appellant Sandez.

Subsequent to the amendment of 21 U. S. C. 174, while the courts have constantly pointed out the burden of proving guilt never shifts from the accuser, still when the possession of narcotics remains unexplained the courts have steadfastly stated that the burden of explaining such possession is on the accused.

> *United States v. Chiarelli, et al.,* 192 F. 2d 528, 531 (C. A. 7, 1951).

This court has considered and held the effect of the presumption above noted as contained in the Jones-Miller Act applying its effect in like cases.

> *Ferrari v. United States,* 169 F. 2d 353 (C. A. 9, 1948).

To similar effect:

> *Pitta v. United States,* 164 F. 2d 601 (C. A. 9, 1947); and
>
> *Gonzales v. United States,* 162 F. 2d 870 (C. A. 9, 1947).

V.

There Was Sufficient Evidence to Support the Judgment and the Sentence of Guilt as to the Substantive Counts. The Competency of Declarations and Acts of a Confederate Are Not Confined to Prosecutions for Conspiracy.

At several points in appellant's opening brief it is urged that there was insufficient evidence to support the judgment both as to the substantive counts, namely, Counts 8 and 9 and as to Count 10, the conspiracy count. On page 37 of such brief comment is urged that the defendant was shown to not understand the English language by the reason of the testimony of the interpreter Armida Bay. This contention is also urged in other points in appellant's brief concerning the conversations Sandez had when interrogated by Officers Ruskin, Buchanan and Jones.

The answer to such contention concerning appellant's inability to understand or speak English is that such contention was not only urged at trial but the jury weighed such evidence and apparently found to the contrary. It appears to be well established that the credibility of witnesses and the weight of evidence is for the trier of facts and not for the appellate courts to determine.

Such matters are jury questions and the appellate court must assume the jury resolved all conflicts in favor of appellee and must assume the evidence proved all facts which it reasonably tended to prove.

> *Barone v. United States,* 205 F. 2d 909, 912 (C. A. 8, 1953).

Cases following this well established rule that the credibility of witnesses and the weight of the evidence are to

be determined by the trier of the facts are legion. To such effect see:

Goldman v. United States, 245 U. S. 474 (1918);

Gage v. United States, 167 F. 2d 122, 124 (C. A. 9, 1948);

Pasadena Research Lab. v. United States, 169 F. 2d 375, 380 (C. A. 9, 1948);

Butzman v. United States, 205 F. 2d 343, 349 (C. A. 6, 1953) cert. den. 346 U. S. 828;

United States v. Markman, 193 F. 2d 574, 576 (C. A. 2, 1952).

Taking the evidence as a whole not only as it applies to the substantive counts, but also to the conspiracy count the rule is likewise well established that a verdict supported by sufficient evidence is binding on a reviewing court.

United States v. Socony Vacuum Oil Co., Inc., 310 U. S. 150, 254 (C. A. 7); *Glasser v. United States*, 315 U. S. 60, 80 (C. A. 7) as follows:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *United States v. Manton*, 107 F. 2d 834, 839, and cases cited."

We submit that the evidence which the jury believed not only amply supports, but in fact compels the verdict which the jury returned. The rule as stated in this Circuit is noted in *Stillman v. United States*, 177 F. 2d 607 at p. 616:

> ". . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and

since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States,* 120 F. 2d 115 (C. A. 9), certiorari denied 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503; *Henderson v. United States,* 143 F. 2d 681 (C. A. 9)."

A. Declarations of Confederates Are Not Confined to Prosecutions for Conspiracy.

It is our view that even under the substantive counts since the heroin there involved is the same heroin excepting as it was later cut, that was found on the night of arrest April 15, that the acts and declarations of Perno made to Agent Katz are the acts of a confederate and are binding on Sandez as to the two substantive counts—Counts 8 and 9.

There is considerable authority applying the law of conspiracy in a criminal action charging only a substantive offense against two or more defendants. One of the earliest cases is *American Fur Co. v. United States,* 2 Pet. 358, 27 U. S. 358, 364, in which case the court stated the rule as follows:

> ". . . Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestae,* may be given in evidence against the others. . . ."
>
> *United States v. Olweiss, et al.* (2 Cir., 1943), L. Hand, 138 F. 2d 798, 799, 800, cert. den. 321 U. S. 744.

"The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admis-

> sion does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

In *Vilson v. United States,* 61 F. 2d 901 (C. A. 9, 1932), there was no charge of conspiracy alleged in the indictment. However, the court held that there was substantial evidence to show the defendant was engaged in a common conspiracy to do the acts involved. It was further held that even though a conspiracy was not charged, the common object of the associated persons formed a part of the *res gestae* and evidence relating thereto was admissible.

In *Cossack v. United States,* 82 F. 2d 214 at 216 (C. A. 9, 1936), the court held as follows:

> "When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others."

As early as 1915, the Court of Appeals for the *Ninth Circuit* in *Belden v. United States,* 223 Fed. 726, at page 730 held:

> "It is a common thing to have the question arise whether one defendant is bound by the statements and acts of another, or of persons not even connected by indictment with the offense charged, and the constant ruling has been that, if there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other, and

this without the necessity of the alleging conspiracy in the commission of the offense."

To similar effect:

Hitchman Coal & Coke Co. v. Mitchell (1917), 245 U. S. 229, at 249;

Neal v. United States (D. C. Cir., 1950), 185 F. 2d 441, cert. den. 340 U. S. 937;

Las Vegas Merchant Plumbers Assn. v. United States, (9 Cir., 1954), 210 F. 2d 732, p. 751;

Robinson v. United States (9 Cir., 1929), 33 F. 2d 238;

Ladrey v. United States (C. A. D. C., 1946), 155 F. 2d 417;

United States v. Food & Grocery Bureau (S. D. Cal., 1942), 43 Fed. Supp. 966, 971.

VI.

The Court Did Not Err in Denying Appellant Sandez's Motion for Acquittal at the Close of the Government's Case.

Commencing on page 34 and again on page 41 of appellant's brief it is asserted that a motion of acquittal should have been granted at the close of the government's case. It would appear from the statement of facts adopted from appellant's opening brief and from our herein noted additions, that there was substantial evidence to connect the defendant as a confederate in both the substantive counts, namely, 8 and 9, which pertained to the same heroin as that found in the motel on April 15, 1955 (excepting that the heroin later was cut with sugar of milk and thereby its volume had been increased). It is most likely

to assume from such evidence that there was a conspiracy in operation and that Sandez was a party to same. There is no question but what a crime involving narcotics had been committed prior to the arrest of Sandez and his subsequent admissions, namely, the *corpus delicti* had been established.

In considering a motion for judgment of acquittal the governing rule is 29(a) of the Federal Rules of Criminal Procedure, Title 18. In a recent income tax case decided by this court in considering the rule to be applied when a motion for judgment of acquittal was made the court stated in *Elwert v. United States,* 231 Fed. 928 (C. A. 9, 1956), as follows (p. 933):

> "The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. If, under this test, the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits, this court applies no special rule to review circumstantial evidence on appeal. As to circumstantial proof of intent see this court's *en banc* decision in McCoy v. United States, 9 Cir., 169 F. 2d 776, certiorari denied 1948, 335 U. S. 898."

The trial court was correct in its rulings and is fully supported by the evidence of the case and the governing law. When a motion for a judgment of acquittal is made, the law appears to be that the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the government, tends to

show the defendant is guilty beyond a reasonable doubt. *Hemphill v. United States,* 120 F. 2d 115, 117 (C. A. 9), cert. den. 314 U. S. 627; *Mills v. United States,* 194 F. 2d 184 (C. A. 4); *Pritchett v. United States,* 185 F. 2d 438 (C. A., D. C.) 341 U. S. 905; see also, *Gorin v. United States,* 111 F. 2d 712, 721 (C. A. 9), aff'd 312 U. S. 19. No quantity of contradictory evidence will authorize the trial court to direct a verdict if there is sufficient substantial evidence to take the case to the jury.

> *Ross v. United States,* 197 F. 2d 660, 665 (C. A. 6).

The *Curley* case (160 F. 2d 229) is one that is frequently quoted in considering the responsibility of the court when such a motion is made. It is quoted from in *United States v. Schneiderman,* 106 Fed. Supp. 906, 920 (D. C. Cal., 1952), aff'd *Yates v. United States,* 225 F. 2d 146. We quote but a portion therefrom.

> "In Curley v. United States, D. C. Cir., 1947, 81 U. S. App. D. C., 160 F. 2d 229, 232, certiorari denied, 1947, 331 U. S. 837, 67 S. Ct. 1511, 91 L. Ed. 1850, the court states: 'The true rule * * * is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' "

VII.

In View of the Record, the Motions Made or the Absence Thereof, No Error Existed in the Jury's Consideration of the Statements Made by the Co-defendant Flores.

On pages 38 and 39 of appellant's opening brief he contends that error occurred in permitting the jury to consider the statements Flores made subsequent to his arrest. The contention is urged that a motion was made with respect to such statements. The admission, or statements, made by co-defendant Flores have been summarized on pages 14 and 15 of appellant's opening brief.

All of such statements were unquestionably admissible against the defendant Flores as admissions and were properly received for that purpose. As we view the record no effort was made at trial to limit the application of these statements some of which are, of course, hearsay, as to appellant Sandez.

It is true that at the close of the government's case the court granted the motion made by the government. [R. 483 and 541.]

The defendant was represented at trial by an able lawyer, Paul Angelillio. As we view the record, commencing with page 530 thereof, counsel for appellant Sandez argued a motion for judgment of acquittal. This motion is to be noted at Reporter's Transcript 530 to 540. The argument was predicated primarily on the proposition that the government had failed to make a *prima facie* case as to the defendant Sandez. The court was not

specifically requested to limit the statements given by Flores to be applied solely to Flores. It is respectfully submitted that had counsel specifically urged such limitation it is likely to assume that the trial court would have limited such evidence. Counsel for the defendant Sandez apparently felt that to have had repeated to the jury the testimony of Flores that is now contended should have been received solely as to Flores and not against Sandez, would have magnified the probable damaging effect of such statements.

It may be that counsel preferred to have some of such statements remain in the record. By way of illustration attention is invited to the testimony of Officer Ruskin who had testified that during one of the conversations Flores had freed Sandez of any blame concerning the narcotics. The question and answer given is as follows:

> "A. I asked defendant Flores if he wanted to help himself, and if he wanted to give us the correct information.
>
> And he stated, 'Well,' he says, 'I brought it up myself for the $100, and this other fellow, Sandez, didn't know anything about it.'" [R. 366.]

A further illustration of an answer testified to by Officer Ruskin that counsel for Sandez may have deemed to have been helpful to the defense is the one where Officer Ruskin is relating the conversation he had with Flores subsequently to the arrest of Flores. It is as follows:

> "A. Flores stated to me that he did not pick up the narcotics in Mexico, that he picked up the narcotics in San Diego, and that in San Diego he met defendant Sandez, and that Sandez just gave him the ride up there because he had nothing else to do." [R. 367.]

This last mentioned answer would have had a tendency to free Sandez from any criminal implication.

During the cross-examination of Officer Jones, Attorney Swafford cross-examined Officer Jones concerning a visit Jones had made at the County Jail where he had interrogated defendant Flores. [R. 227-229.]

During this cross-examination Officer Jones had testified that Flores had told him that Flores was known as "Tutu." Counsel representing the defendant Sandez was content to permit this testimony to remain in the record without making any objections although it was apparent this statement made by Flores had been made out of the presence of Sandez.

We have searched the record and have been unable to find any place where specific effort was made to limit the testimony of statements made by Flores out of the presence of Sandez to be applied solely as to Flores. It may be that it will be urged that the argument on the motion for a judgment of acquittal did by implication raise these points. However, even though such contention may have not been specifically brought to the attention of the trial judge, as we understand the law to require, still we believe the court's instructions covered this problem and protected the defendant Sandez from the effect of any possible hearsay statements that Flores may have made. The court instructed the jury with regard to admissions subsequent to the arrest as follows:

> "Any statement or admission made by a person after his arrest must be considered as having been made after a criminal conspiracy has been ended and any such statement or admission may be considered by you only in connection with the guilt or innocence of that person." [R. 742.]

The court specifically referred to admissions made outside of court by other members of the alleged conspiracy and instructed as follows:

> "You may not use any admission made outside of court by other members of the alleged conspiracy for purposes of determining whether a particular defendant was a member of an unlawful conspiracy unless that defendant was present when the statement was made and so conducted himself as to signify agreement with the statements or declarations. If you conclude, however, from other evidence that a particular defendant was a member of an unlawful conspiracy, you may then consider as if made by that defendant any statements or declarations of other members of such conspiracy, provided such statements were made during the existence of the conspiracy and in furtherance of an object or purpose of the particular conspiracy." [R. 744.]

The court specifically instructed as to the effects of acts or declarations of an alleged conspirator as is to be noted at Reporter's Transcript 743, line 19.

It would therefore appear that the trial court's attention was not properly directed to the hearsay statements made by Flores that are now complained about for the first time on appeal.

The receipt of hearsay evidence without objection cannot be raised for the first time on appeal.

> *United States v. Fleming,* 134 F. 2d 776 (C. A. 2), 1943;
>
> *Trice v. United States,* 211 F. 2d 513, 519 (C. A. 9), 1954;

To similar effect *re* a motion to strike:

> *United States v. Smolin,* 182 F. 2d 782, 786 (C. A. 2), 1950.

VIII.

The Court Did Not Err in Omitting to Instruct the Jury That Oral Conversations or Admissions Were to Be Received With Caution.

On page 40 of appellant's brief he asserts that the court was under a duty to instruct the jury that oral admissions of Sandez were to be received with caution. It is to be noted that after the court had concluded with his instructions no objections were imposed by Sandez to the instructions given. [R. 754.] It is well established by the Federal Rules of Criminal Procedure, Rule 30, Title 18, that no party may assign as error any portions of the charge or omissions therefrom unless he objects to the instructions given. Thus, we see for the first time on appeal an objection is now being made to an alleged omission to give an instruction that the appellant contends should have been given. The court did instruct the jury concerning the effect of admissions made by a person after his arrest [R. 742] and as to the effect of admissions made outside of court for the purpose of determining whether a particular person was a member of an unlawful conspiracy. [R. 744.]

It is significant to note that after the court had given his instructions counsel representing the defendant Flores proposed a supplemental instruction which the court gave. [R. 758.] This dealt with the statute relating to the possession of narcotics and pertained to the unexplained possession thereof. [R. 758-759.] It is apparent from the foregoing that not only did the defendant Sandez at trial waive any right to object to omissions in the instructions, but that furthermore the logical conclusion is that if the court had then been requested he

would have given a cautionary instruction to the effect that admissions made by a defendant were to be received with caution.

The following discussion will concern itself with similar matters where the court either refused to give or where the court omitted to give instructions, as being held not error in the absence of calling such requests to the trial court's attention.

A failure to give an instruction that an oral confession made by a defendant to a police officer should be regarded with caution did not constitute reversible error where there had been no request for such instruction and the omission thereof did not effect defendant's substantial rights.

Obery v. United States, 217 F. 2d 860 (C. A., D. C., 1954).

A failure to ask for additional instructions should not be raised for the first time on appeal.

Cosenza v. United States, 195 F. 2d 177 (C. A. 9, 1952).

To similar effect,

United States v. Stephenson, 110 Fed. Supp. 623 (D. C. Alaska, 1953).

In the last mentioned case complaint was made that a cautionary instruction should have been given as to the effect of the testimony of an accomplice.

While it is deemed better practice to give an instruction against placing too much reliance upon the testimony of an accomplice, still the absence of giving such an in-

struction has been held to be not error. *United States v. Caminetti,* 242 U. S. 470, 495. Like effect as to a narcotic case:

Mullaney v. United States, 82 F. 2d 638 (C. A. 9, 1936).

This circuit recently reaffirmed such rule with respect to the testimony of an accomplice. *Papadakis v. United States,* 208 F. 2d 945 at p. 954 (C. A. 9, 1953). Even a failure to define reasonable doubt has been held to not be a deprival of due process. *United States v. Jonikas,* 197 F. 2d 675 at p. 679 (C. A. 7, 1952). A failure to charge the jury that an information is merely an accusation, of the presumption of innocence, of the testimony of an accomplice has been held not to constitute a fatal defect in the absence of request for such instructions.

United States v. Capital Meats Co., 166 F. 2d 537 (C. A. 2), cert. den. 334 U. S. 812.

Additional cases illustrating that as a general rule there must be a request as is contemplated by Rule 30 of the Federal Rules of Criminal Procedure are, among others, the following:

Kobey v. United States, 208 F. 2d 583, 597 (C. A. 9, 1953);

Brown v. United States, 222 F. 2d 293, 298 (C. A. 9, 1955);

Mitchell v. United States, 213 F. 2d 951, 957 (C. A. 9, 1954);

Pereira v. United States, 202 F. 2d 830, 835-836 (C. A. 5, 1953), aff'd 347 U. S. 1.

IX.

The Evidence Was Sufficient to Support the Verdict of Guilty as to Appellant Sandez to Count 10, the Conspiracy Charge.

Commencing on page 41 of appellant's opening brief, he contends the evidence was insufficient to hold the defendant Sandez as a co-conspirator and on page 43 contends that there was insufficient evidence to show the existence of the *corpus delicti* of the conspiracy count.

It is not our intent to repeat the evidence which we feel justified the jury's conclusion that Sandez was a co-conspirator, an inference which was fully justified by all the facts and circumstances and was admitted by statements made subsequent to his arrest. So far as the *corpus delicti* is concerned, unquestionably there was adequate evidence to illustrate that a conspiracy was in operation, namely, an unlawful conspiracy to deal in heroin. Nothing more need occur to establish the *corpus delicti* than the fact of the unlawful agreement. Hence, when such *corpus delicti* had been abundantly established, admissions made by Sandez were properly receivable. It was noted in *Shibley v. United States,* ..... F. 2d ..... (C. A. 9, Mar. 1955) under footnote (10) "The conspiracy is the crime, and that is one, however diverse its objects. *Frohwerk v. United States,* 249 U. S. 204, 210. See *Nye & Nissen v. United States,* 9 Cir., 168 F. 2d 846, 850, aff'd 336 U. S. 613."

The court quite properly instructed the jury pertaining to the law governing the consideration as to whether or not a conspiracy existed. His instructions on this subject commenced on [R. 739]. This court has repeatedly announced the rules that govern in considering whether a conspiracy exists and as to the effect of an act or decla-

ration of a co-conspirator in furtherance thereof and made while such conspiracy is in operation.

A narcotic case with some similarity to the instant case is *Penosi v. United States,* 206 F. 2d 529 (C. A. 9, 1953) which case illustrates what facts are sufficient to infer that an individual was a party to the conspiracy, pointing out that it is immaterial whether the evidence be direct or circumstantial. Volumes have been written upon the subject matter of what may be considered in connection with whether or not a criminal conspiracy is in operation and whether any given person was or was not a co-conspirator. We shall confine our comments to but a few cases on this subject.

The law of conspiracy, by the very nature of such an unlawful venture, usually covertly planned, is one which allows great latitude in drawing proper inferences from direct and circumstantial evidence to show the existence of the conspiracy. It is well settled that:

> "Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances."
>
> *Glasser v. United States,* 315 U. S. 60, 80.

To the same effect:

> *United States v. Manton,* 107 F. 2d 834, 839 (C. A. 2); and
>
> *Curley v. United States,* 160 F. 2d 229, 236 (C. A., D. C.).

An often quoted case, in support of this principle, and one which contains a concise statement of many of the important principles involved in the law of conspiracy

is the Ninth Circuit case of *Marino v. United States,* 91 F. 2d 691 (C. A. 9), cert. den. 302 U. S. 764.

Not only is it well settled that a conspiracy may be proven by circumstantial evidence, but also that it should not be judged by dismembering it and viewing its separate parts, but only by looking at the evidence as a whole, in its entirety. In *Carlson, et al. v. United States,* 187 F. 2d 366, 371 (C. A. 10), the following was stated:

> ". . . As has been stated, '. . . the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' "

A conspiracy is a secret, furtive crime and by its very nature must usually be proved by circumstantial evidence.

> *Ryan v. United States,* 99 F. 2d 864 (C. A. 8), reh. den. 306 U. S. 668;
>
> *Rose v. United States,* 149 F. 2d 755 (C. A. 9).

> ". . . Ordinarily, only the results of a conspiracy, and not the private plotting and promoting, are observed." *Rose v. United States, supra,* p. 759.

> ". . . But, proof of a conspiracy, by its very nature must be circumstantial, and the step between innocent knowledge and guilty intent and agreement may be, and is usually shown by prolonged and interested cooperation, indicating a 'stake in the venture.' " *Van Huss v. United States,* 197 F. 2d 120, 121 (C. A. 10).

It is, of course, elementary that every act or declaration of each member of a conspiracy in furtherance thereof

and while the conspiracy is in operation is considered the act and declaration of each member of a conspiracy.

Barnett v. United States, 171 F. 2d 721 (C. A. 9, 1949).

This being the rule the declarations made by Vince Perno to Agent Katz when Agent Katz was negotiating to buy a quantity of heroin for $25,000 and where Perno referred to his source as being "Tutu" in Tijuana was a declaration made in furtherance of the conspiracy. [R. 60-61.] Such declaration had a tendency to have led the prospective buyer, had he been one who was illegally dealing in narcotics rather than a government agent, to have had more reliance on the ability of Perno to supply such narcotics and should properly be interpreted as being in the furtherance of the conspiracy and hence binding upon Sandez.

The doctor's business card found upon Sandez [Ex. 30] with Golden Elliott's phone number written in reverse fashion was in confirmation and of itself a document from which guilty knowledge could be inferred when taken in conjunction with the previous contacts had between Perno and Agent Katz and the activities of Brown, Greer and Perno on the date of the arrest, namely, April 15, 1955. This card similar to the piece of paper taken from the pocket of a co-conspirator which bore a telephone number of a prune pitter when arrested has a striking similarity and are grounds to infer that the carrying of such telephone number was a result of complicity in the conspiracy charged and then in operation. The case of the telephone number of the prune pitter where the charge pertained to possessing an illegal still and conspiracy to commit such an offense is *United States v. Heitner,* 149 F. 2d 105 (C. A. 2, 1945).

A person may be found guilty as a party committing a substantive offense and likewise as to conspiring to violate the laws against dealing in narcotics.

> *Carrado v. United States,* 210 F. 2d 712 (C. A., D. C., 1953).

Proof of active membership during the entire alleged life of a conspiracy is not required to sustain a conviction of guilt. Such is the rule announced in the narcotic case *United States v. Markman,* 193 F. 2d 574 (C. A. 2, 1952). The *Markman* case likewise discusses the effect of admissions and the corroboration needed which subject has been treated at another point in this brief. In discussing such rule of the corroboration needed the court states:

> "The purpose of the rule requiring corroborative testimony is only to guard against convictions based upon an untrue confession. Warszower v. United States, *supra,* 312 U. S. at page 347, 61 S. Ct. 603. Its function is not so much to give evidence of the defendant's guilt as to supplement his confession to that effect. United States v. Kertess, 2 Cir., 139 F. 2d 923, certiorari denied Kertess v. United States, 321 U. S. 795." (P. 576.)

(a) There Was Sufficient Proof Aliunde to Establish Appellants Connection With the Existing Conspiracy.

Commencing on page 42 of appellant's opening brief reference is had to the *Glasser* (315 U. S. 60) and *Schneiderman* (106 Fed. Supp. 892) cases; both of which authorities the government contends support its position.

The argument advanced is that : (1) Statements of a purported co-conspirator (Perno) cannot be used to establish the existence of the conspiracy nor appellant's con-

nection to it; (2) The statements of a purported co-conspirator (Flores) made after the termination of the conspiracy cannot be used to establish the existence of a conspiracy, nor appellant's connection with it.

To the second, or last referred to contention, we are in agreement; however, appellant apparently confuses the language of the *Glasser* and *Schniederman* opinions.

It must be borne in mind that even the *Glasser* opinion in referring to declarations made by a co-conspirator out of the presence of an alleged co-conspirator adds this vital observation (p. 74):

> ". . ., only if there is proof aliunde that he is connected with the conspiracy."

There is nothing in either of these opinions that demands that the proof of the existence of a conspiracy in operation must precede the date of the declaration of an alleged co-conspirator. Indeed, in the instant case, the existence of the conspiracy, the unlawful agreement, or the *corpus delicti,* was substantially established directly and circumstantially by the testimony of Agent Katz concerning his dealing with Perno, of the complicity of the co-conspirators Greer and Brown and their observed activities on April 15, the date of the arrest.

Evidence *aliunde* of appellants Sandez (and likewise his friend Flores) connection could well be inferred from the fact of their close presence to the motel where the narcotics were being sold at the very hour, or minute of such transaction coupled with the suspicious conduct of Sandez as then observed by Officers Ruskin and Buchanan.

The language of the *Schneiderman* case, *supra,* is appropriate (p. 901):

> "A conspiracy, like any other crime, can only be established by the various external manifestations of the parties—the acts and conduct and declarations or statements of third persons, taken together with the acts and conduct and declarations or statements of the defendants. Garhart v. United States, 10 Cir., 1946, 157 F. 2d 777, 780-781. This does not mean that the existence of the conspiracy may be proved solely by the declarations or statements of the defendants themselves, for these might fall into the field of extra-judicial admissions and so require corroboration. Since conspiracy is the criminal offense charged, there must be some corroborating evidence of the existence of this *corpus delicti aliunde* the extra-judicial statements or declarations of the accused."

Judge Mathes in the *Schneiderman* case, alike the justification Judge Yankwich was entitled to arrive at in the instant case concluded (p. 901):

> ". . . for there is abundant evidence *aliunde* declarations of the accused which, if believed, would be sufficient to show the existence of the conspiracy."

Order of Proof. It is especially the rule of law in conspiracy trials, or trials involving confederates, that the order of proof is a matter wholly within the discretion of the trial court. *Bartlett v. United States,* 166 F. 2d 920, 925 (C. A. 10, 1948). In the *Bartlett* opinion the following appropriate language is noted (p. 925):

> "While the declarations of one alleged co-conspirator are not admissible against another co-conspirator, unless the existence of the conspiracy is established by other evidence, the declarations of

each co-conspirator are admissible as against him, and the whole evidence may be considered in determining whether a conspiracy has been established. In other words, when the independent evidence, together with the acts and declarations of one conspirator, established the conspiracy, and the independent evidence, together with the acts and declarations of the other conspirator, establish the conspiracy, the declarations of each co-conspirator, made during the pendency of the conspiracy and in furtherance of its object, are admissible against both."

To like effect *re* order of proof:

Briggs v. United States, 176 F. 2d 317 (C. A. 10, 1949).

It is noted in a recent narcotic conspiracy case, *United States v. Sansone,* 231 F. 2d 887, 893 (C. A. 2, 1956), a discussion of the settled principles applying to the acts and declarations of co-conspirators after which observations the court states (p. 893):

"Nor does it make any difference that when the evidence concerning the sale of July 3 was introduced, the prosecution had not yet proved appellant's connection with the conspiracy. The order in which evidence is received is within the discretion of the trial court."

The *Sansone* case is of additional interest in connection with the instant case, for alike here, in the *Sansone* case, a card with a telephone number on it was obtained by the arresting officer, and was introduced into evidence. A motion to suppress such card was denied on the grounds of being untimely.

In concluding this subject and the consideration to be given to the part played by each conspirator the following language is appropriate:

> "Phelps v. United States, 160 F. 2d 858, 867, 868 (C. A. 8):
>
> "Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant's connection with it may be merely a matter of whether the stick fits so naturally into position in the fagot as to convince that it is a part of it. It is therefore possible for the circumstances on an individual defendants participation in an established conspiracy to become substantial from their weight in position and context, though in abstraction they may seem only slight. . . ."

An illustration of an unknown party who may be considered a co-conspirator and whose acts were binding on named defendants is the case involving the "tail car," *United States v. Harrison,* 121 F. 2d 930, 934 (C. A. 3):

> "Finally, the appellant protests the admission by the truck driver concerning the 'tail' car and the warning given by its occupants that the truck was being followed. The trial judge's remark that 'I think the jury is entitled to infer that they were co-conspirators from their actions' is claimed to be prejudicial. Like the evidence of the failure to report the sugar sale, the testimony about the 'tail' car was circumstantial evidence of the common design. That these unknown parties were co-conspirators might, of course, be inferred from the circumstances and did not have to be directly proved. Unknown conspirators may be indicted along with named conspirators. The acts of any co-conspirator are admissible against all even when the actors are not indicted, and even though the accused was not present."

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

NORMAN W. NEUKOM,
Assistant U. S. Attorney,
Chief Trial Attorney.

Attorneys for Appellee.

APPENDIX.

In the United States District Court, Southern District of California, Central Division.

United States of America, plaintiff, vs., Howard Vincent Perno, Robert Brown, Frank Willie Greer, Jr., Juan Jose Flores, Salomon Rodrigo Sandez, Jr., Golden Esther Elliott, and Eddie Sonnelli, Defendants. No. 24,255-Criminal.

Honorable Leon R. Yankwich, Judge Presiding.

APPEARANCES:

For the Plaintiff:	LAUGHLIN E. WATERS, Esq. United States Attorney By JAMES R. DOOLEY, Esq. Assistant United States Attorney
For the Defendant: Howard Vincent Perno:	PAUL MAGASIN, Esq. and LEO K. GOLD, Esq. 300 South Beverly Drive, Suite 209 Beverly Hills, California.
For the Defendant: Robert Brown:	ROLAND WILSON, Esq. 565 West 5th Street San Pedro, California.
For the Defendant: Frank Willie Greer, Jr.:	HERMAN A. ENGLISH, Esq. By THEODORE J. ELIAS, Esq. 1570 East 103rd Street Los Angeles, California.
For the Defendant: Juan Jose Flores:	THEODORE J. ELIAS, Esq. 416 West 8th Street, Room 1212 Los Angeles, California.

For the Defendant: Salomon Rodrigo Sandez, Jr.:	PAUL ANGELILLO, Esq. 408 South Spring Street, Room 205 Los Angeles, California.
For the Defendant: Golden Esther Elliott:	MAX BAMBERGER, Esq. 650 South Grand Avenue, Room 914 Los Angeles, California

ALSO PRESENT:

Armida Bay, Spanish Interpreter.

Los Angeles, California, Monday, May 23, 1955. 10:00 A. M.

(Other cases called.)

The Court: Now, I think we had better take up the criminal matter, gentlemen, because these other matters may take a little time.

Let's take up the criminal matter, gentlemen, United States against Perno, and others.

The Clerk: Case 24,255, United States against Howard Vincent Perno, Robert Brown, Frank Willie Greer, Jr., Juan Jose Flores, Salomon Rodrigo Sandez, Jr., Golden Esther Elliott.

The Court: And there is one other.

The Clerk: And Eddie Sonnelli.

The Court: All right. Which one is Eddie Sonnelli? Is he here?

The Clerk: I understand he is a fugitive.

The Court: A fugitive. Now, gentlemen, this matter is up here for plea. As I understand it, they did not plead in Judge Hall's court, and will plead here.

The Clerk: Are those your true names, as called, all of you?

Defendants: Yes, sir.

The Clerk: Now, I have attorney Roland Wilson represents Robert Brown. Is that right?

Mr. Wilson: That is correct.

The Clerk: And Leo K. Gold represents Perno?

Mr. Magasin: And I also, Paul Magasin, on behalf of Perno.

The Clerk: And who?

Mr. Magasin: Paul Magasin, M-a-g-a-s-i-n.

The Clerk: Herman English represents Frank W. Greer, Jr.?

Mr. Elias: May I say about that that Mr. English was required to be in another court. I am representing another defendant, and he asked me to appear for Mr. Greer for the purpose of entering a not guilty plea.

The Clerk: What is your name, please?

Mr. Elias: My name is Theodore Elias.

The Clerk: And you are representing another defendant here? You represent Mr. Flores?

Mr. Elias: That is correct.

The Clerk: And Paul Angelillo for Sandez?

Mr. Angelillo: That is right.

The Clerk: Counsel, do each of you have a copy of the indictment?

Mr. Magasin: I, on behalf of Mr. Perno, waive reading it.

The Clerk: Waive reading of the indictment?

Mr. Angelillo: Waive the reading for Sandez.

Mr. Elias: Waive the reading on behalf of Greer and Flores.

Mr. Wilson: Waive on behalf of Brown.

Mr. Bamberger: Waive reading on behalf of the defendant Golden Esther Elliott.

The Clerk: All right. Do you have Perno here? I will take Perno first.

The Court: All right.

The Clerk: Mr. Perno, what is your plea to Count 1 of the indictment?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 2?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 3?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 4?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 5?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 6?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 10?

Defendant Perno: Not guilty.

The Clerk: Mr. Brown, Robert Brown, what is your plea to Count 4 of the indictment?

Defendant Brown: Not guilty.

The Clerk: And what is your plea to Count 10?

Defendant Brown: Not guilty.

The Clerk: Frank Willie Greer, Jr., what is your plea to Count 4 of the indictment?

Defendant Greer: Not guilty.

The Clerk: And what is your plea to Count 10?

Defendant Greer: Not guilty.

The Clerk: Juan Jose Flores, what is your plea to Count 8 of the indictment?

Mr. Wilson: Wait a minute.

(Thereupon the interpreter came forward.)

The Court: Was the interpreter also in Judge Hall's court?

Mr. Wilson: Yes, in Judge Hall's court.

The Court: We just want to make sure. All right.

Defendant Flores (Through interpreter): Not guilty.

The Clerk: What is your plea to Count 9?

Defendant Flores (Through interpreter): Not guilty.

The Clerk: What is your plea to Count 10?

Defendant Flores (Through interpreter): Not guilty.

The Clerk: Salomon Rodrigo Sandez, Jr., what is your plea to Count 8 of the indictment?

Mr. Angelillo: We will use the interpreter again for this defendant.

The Court: All right.

Defendant Sandez (Through interpreter): Not guilty.

The Clerk: What is your plea to Count 9?

Defendant Sandez (Through interpreter): Not guilty.

The Clerk: And what is your plea to Count 10 of the indictment?

Defendant Sandez (Through interpreter): Not guilty.

The Clerk: Golden Esther Elliott, what is your plea to Count 7 of the indictment?

Defendant Elliott: Not guilty.

The Clerk: And what is your plea as to Count 10?

Defendant Elliott: Not guilty.

The Clerk: That is all of them, your Honor. Eddie Sonnelli is a fugitive.

The Court: All right. Gentlemen, the case was sent over here with the understanding that we have a plea entered, and that I find a trial date. I told Judge Hall that I would determine whether I can try it, or someone else. There is no particular judge available at the present time.

How long will this case take? I gather all of these matters arose out of the same series of transactions?

Mr. Magasin: Yes, I think that is correct.

The Court: What was the maximum estimate for the Government?

Mr. Magasin: The United States Attorney's Office is not represented here at the moment, if your Honor please. The assistant or deputy who was in court is not here now.

The Court: Well, he should be here. We can't go on without him. I could go on with the arraignment and plea, but somebody should have called my attention to that.

Mr. Angelillo: I think an estimate was made as to a week or ten days. Is that correct, Mr. Magasin?

Mr. Magasin: I am not certain who made that estimate, but somebody did. I am not aware who made that estimate.

The Court: Supposing we continue it to next Monday for setting. Before we do that, however, you ought to get the United States Attorney in here.

Mr. Dooley: Your Honor, I will go up and see who has the case.

The Clerk: It shows Bruce Bevan on this calendar.

The Court: Well, let the record show that you were present, Mr. Dooley, and you have been here for the purpose of the arraignment and plea.

Mr. Dooley: Yes, your Honor.

Mr. Magasin: Your Honor, there is something here: The defendant Perno tells me that he is about to be operated on. He is in the County Jail, and he has a wound in his lung, and he is expecting to have surgery in about a week, so it may be—I wanted to call that to the attention of the court, in view of other counsel representing other defendants here. There is no exact time as to when he will be free. He just called this to my attention at this moment.

The Court: Supposing we continue the matter, then, for a week, gentlemen. As I told you before, I could give you a date in the middle of June, to try this case, and I could take it on on any Tuesday, either the 14th or the 21st of June. It is better to start it earlier. Of course, if he is waiting his turn, you cannot tell. You may not be able to tell when they will be able to get around to it. The difficulty about the last week in June is that we have obligatory attendance at the Judicial Conference. However, if we set it now for the 14th of June, we have got two weeks in which to dispose of it, two full weeks, and if the matter is not of an urgency, that will put him in the position to forego the operation, unless the doctor will send up a certificate saying that he is not in a position to go on with the trial.

Mr. Magasin: Your Honor, he has just really told me now about it, and, of course, he is not medically acquainted with the situation, but I wanted the court to have the information I do have, and he says it is of an emergency

nature, but we will procure actual medical advice for the court between now and the next hearing.

The Court: Suppose we set it for trial on the 14th. Then if it appears that he cannot be present, then the question for us to determine will be whether we can go on as to the other defendants. Of course, many of the defendants are named as to some of the counts only. I assume they are all named in the conspiracy count.

The defendants are in custody, and it is our desire to give quick trial. That is the reason why Judge Hall called me off the bench, and told me about this.

Suppose we set it for trial, then, for Tuesday, June the 14th, and then if the condition of this defendant is such that he must have this surgery and cannot be present, then, of course, you will inform the court and make the motion.

Mr. Magasin: I will inform the court accurately as soon as I obtain the information, and I think we can obtain the information.

The Court: Are you willing to take the responsibility, Mr. Dooley, of representing your office?

Mr. Dooley: Yes, your Honor. I would like to get the number of this.

The Clerk: 24255.

The Court: I think Judge Hall informed counsel that he would try to get somebody to try it as quickly as possible because of the fact that many of the defendants are in jail and cannot make bond.

Then if any unusual circumstance develops, you may let me know.

You may remove the prisoners, gentlemen, without waiting for the court to adjourn.

CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of June A. D. 1956.

MARIE G. ZELLNER,
Official Reporter.